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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Head notes prepared by M. P. Burks, State Reporter.)

FORD & BENNICK, TRUSTEES, v. WATTS, SHERIFF AND OTHERS.—

Decided at Staunton, September 23, 1897.—*Cardwell, J.*:

1. INJUNCTION AGAINST SALE UNDER EXECUTION—*Motion to dissolve—Executions in evidence—Case at bar.* Upon a motion to dissolve an injunction awarded on a bill filed to enjoin the sale of personal property under executions levied thereon, the court of necessity must consider the executions, and, upon the evidence in this cause, it appears that they were considered. They are therefore properly copied into the record of this cause.

2. TRUSTEES—*Suits to administer trust—Possession of trustee is possession by the court—Interference—Adverse claims.* The possession of a trustee acting under the orders of a chancery court in a suit instituted by him for the purpose of administering the trust, is the possession of the court in which the suit is pending. The trustee occupies the same position, in respect to the trust property under his control, as if he were a receiver appointed by the court. No interference with the possession of such trustee will be tolerated without the leave of the court first obtained, and any attempt at such interference will be restrained by injunction for that purpose. Adverse claimants must assert their claims in the court having jurisdiction over the trustee and the trust subject, or obtain leave of that court to sue the trustee.

THE SOUTHERN RAILWAY COMPANY v. BRYANT'S ADM'R.—Decided

at Staunton, September 23, 1897.—*Riely, J.*:

1. RAILROADS—*Public crossings—Warning—Virginia statute.* Independently of any statute it is the duty of a railroad company to give timely warning of the approach of its trains to the crossing of a public highway. While the company has the right of way at public crossings, it must give timely warning of the approach of its trains. This duty is emphasized by statute in Virginia. Acts 1893-4, p. 824.

2. RAILROADS—*Public crossings—Negligence—Burden of proof.* In an action against a railroad company to recover damages resulting from negligently failing to give timely warning of the approach of one of its trains to a public crossing, the burden is on the plaintiff to prove such negligence.

3. EVIDENCE—*Positive and negative—Sounding of a steam whistle.* The testimony of a witness who denies that a railroad whistle was sounded on a given occasion is as positive evidence as the testimony of another who affirms the fact, where each has equal opportunity of hearing, and the attention of the former, because of special circumstances, is equally drawn with that of the latter to the sounding of the whistle. The denial of the one and the affirmation of the other produces a conflict of evidence, which it is the province of a jury to determine.

4. RAILROADS—*Public crossings—Looking—Obstructed view.* A traveller about to cross a railroad at a public crossing is excused from the duty of looking for

approaching trains when looking would be unavailing on account of obstructions to the view. If injured in attempting to cross under such circumstances the propriety of his going upon the track is a question for the jury to determine.

5. CONTRIBUTORY NEGLIGENCE—*Burden of proof—Presumption.* In an action for personal injuries inflicted by a defendant where the plaintiff has shown negligence on the part of the defendant, if the defendant relies on the contributory negligence of the plaintiff, the burden is on the defendant to prove it, unless it is disclosed by the plaintiff's evidence or may be fairly inferred from all the circumstances; and, in the absence of such proof, the person injured must be presumed to have been without fault.

6. RAILROADS—*Public crossings—Listening—Failure to stop—Presumption.* Driving upon a railroad track at a public crossing at a slow gait, without stopping, is not evidence *per se* that the traveller did not listen for approaching trains. The negligence of the railroad company being established, in the absence of evidence to the contrary, the presumption, though slight, is that the traveller did his duty in approaching the track.

7. VERDICTS—*Contrary to evidence—Appellate court.* This court has no power to disturb the verdict of a jury, as contrary to the evidence, unless satisfied that the evidence is plainly insufficient to sustain it.

KIMBALL & FINK, RECEIVERS, v. BORDEN.—Decided at Staunton, September 23, 1897.—*Buchanan, J:*

1. INSTRUCTIONS—*Evidence to support—Effect of misdirection.* It is error to give an instruction which there is no evidence to support. It tends to mislead the jury by withdrawing their attention from the legitimate points involved in the issue. If the jury is misdirected it will be presumed that it affected their verdict, unless it appears from the whole record that the misdirection did not, and could not, have affected the verdict.

2. PLEADING—*Duplicity—Special demurrer.* Duplicity in a declaration can only be taken advantage of by special demurrer, and as special demurrers have been abolished in Virginia, duplicity is no longer a ground of demurrer.

3. PLEADING—*Declaration—Communicated fires—Averments as to ownership of personal property burned.* In an action to recover damages for a fire negligently communicated by the defendant, an averment in the declaration that the plaintiff was seised and possessed of a cooper's shop and warehouse which were destroyed by fire, and that in said houses and on the yard thereof was certain personal property also burned, is sufficient to show that said personal property was on the premises of the plaintiff and in his possession, and to sustain an action against a wrongdoer for its destruction, though the plaintiff's ownership ought to have been distinctly and positively averred.

4. INSTRUCTIONS—*Calling special attention to only part of the evidence.* An instruction should not be given which calls special attention to a part only of the evidence and the particular fact or facts it tends to prove, and ignores the residue of the evidence and the facts it tends to prove.

5. RAILROADS—*Fires—Burden of proof.* In an action against a railroad company to recover damages for setting fire to the plaintiff's property, where it appears